Supreme Court, U.S.
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No.

In The

**Supreme Court of the United States**

October Term, 2000

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DAVID WILSON, individually and through his Guardian ad Litem, ELAINE WILSON DUNMORE, and as representative of a class,

Petitioner,

v.

THE STATE OF WASHINGTON; THE WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES DIVISION OF PROVIDER SERVICES, and the DIVISION OF PROVIDER SERVICES THIRD PARTY RESOURCE PROGRAM,

Respondents.

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**On Petition For a Writ of Certiorari To The Supreme Court Of The State of Washington**

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# PETITION FOR WRIT OF CERTIORARI

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Filed March 9, 2001

RPI Legal Printers, Seattle, Washington

## QUESTIONS PRESENTED

1. Where federal Medicaid recovery statutes require the states to obtain an assignment from every Medicaid recipient of the recipient's medical expense claims against potentially liable third parties and such federal statutes require the states, as asignees of these medical expense claims, to actively pursue recovery from liable third parties, including tortfeasors, does the State, after the assignment occurs, own the medical expense claim against a tortfeasor that caused injury to the recipient, while the Medicaid recipient continues to own the unassigned causes of action for disability wage loss and other general damages and any recovery made thereon?

2. Where federal Medicaid statutes prohibit State liens and recoveries against the property of Medicaid recipients for Medicaid expenditures during a recipient's lifetime, and Washington's Medicaid lien statutes permit the State to impose a lien upon any sum due and owing to a Medicaid recipient by a tortfeasor and to collect up to 100% of an injured Medicaid recipient's net tort recovery for all elements of damage, including the recovery for unassigned causes of action, in satisfaction of the State's Medicaid lien, do the federal anti-lien statutes pre-empt Washington State's Medicaid lien laws?

3. Does Congress' expressed intention that Medicaid be the "payor of last resort" mean that, despite

application of the federal Medicaid anti-lien laws and the federal requirement that Medicaid recipients assign to the State "any rights...to payment for medical care" only, the State can seize up to 100% of an injured Medicaid recipient's net tort recovery to satisfy the State's Medicaid lien?

## PARTIES TO THE PROCEEDING

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David Wilson, individually and as representative for a proposed class of plaintiffs, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

## OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition. It is reported at 142 Wash.2d 40, 10 P.3d 1061 (2000).

## JURISDICTION

The Washington Supreme Court rendered its opinion on October 19, 2000. A timely Motion for Reconsideration was denied on December 14, 2000. On that date, the decision below became final (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which provides that this Court may review the decision of the highest court of a state of the United States of America, where "the validity...of a statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to...laws of the United States."

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

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## STATEMENT OF THE CASE

Medicaid is a federal program which provides medical benefits for our nation's poorest citizens, public assistance recipients. Each State participating in the Medicaid program must agree to abide by federal Medicaid statutes and regulations in order to receive federal funds with which to pay medical benefits on behalf of the State's public assistance recipients. On the federal level, Medicaid is administered by the Department of Health and Human Services (DHHS) through the Healthcare Finance Administration (HCFA) and, in Washington State, the program is administered by the Washington State Department of Social and Health Services (DSHS) through the Division of Provider Services (CP55). DSHS receives fifty percent of its funding for Medicaid benefits paid on behalf of Washington public assistance recipients from the federal government.

David Wilson is a severely disabled nine year old boy who resides in Seattle, Washington. David was one of two premature twin boys born to their mother in January 1992 when she was disabled from work due to her pregnancy, and was receiving public assistance benefits, including Medicaid benefits, for herself and her children. After Elaine Wilson's twins were born, they were hospitalized for several weeks at

a Seattle area hospital for complications of their premature birth. They were eventually released from the hospital, but David was almost immediately readmitted and diagnosed with staphylococcal aureus meningitis which had progressed to the point that it had seeded into his brain. Several brain surgeries and another lengthy course of hospitalization followed, for which DSHS, through the Medicaid program, paid $184,555 in medical expenses. (CP 54-55; CP 145.)

In July, 1994, an attorney guardian ad litem brought a medical negligence suit against the hospital and physicians who treated David during his initial hospitalization alleging that the defendants violated the applicable standards of care in their evaluation and treatment of David, and that these violations caused David's brain injury. The medical negligence claim was complex, involving detailed medical records analysis, extensive pretrial discovery, expert reviews and retention of experts in multiple specialty areas, and numerous other projects and tasks. By the time the claim went to mediation in July 1995, plaintiffs' counsel had advanced over $42,000 in litigation costs. (CP 55-56; CP 151-183.)

On December 1, 1992, DSHS filed a "STATEMENT OF LIEN" with the King County auditor and sent a copy of the lien to David Wilson's counsel. The LIEN stated:

Notice is hereby given that the State of Washington, Department of Social and Health Services, has rendered assistance or provided residential care to David L. Wilson, a person who was injured on or about the 21st day of January, 1992, in the County of King, State of Washington, and the said Department hereby asserts a lien, to the extent provided in RCW 43.20B.060, for the amount of such assistance or residential care, upon any sum due and owing David L. Wilson, from...Hospital, alleged to have caused the injury, and/or his or her insurer and from any other person or insurer liable for the injury or obligated to compensate the injured person on account of such injuries by contract or otherwise. (Emphasis supplied.)

Other than file and distribute its STATEMENT OF LIEN, DSHS did nothing to pursue collection of the amounts the agency had paid toward David Wilson's medical bills from the potentially liable tortfeasors, nor did it advance any of the litigation costs. (CP 56.)

David Wilson's medical malpractice case settled at mediation for a sum far less than adequate to compensate David for his injuries and disabilities, which sum was nevertheless accepted by David's guardian ad litem and his mother because of the significant risk of a defense verdict or other negative result at trial. During settlement negotiations in the malpractice case, DSHS refused to forgive or compromise its "lien" beyond the amount required by Washington statute for its share of pro rata attorneys fees and litigation costs. (CP 56-57.) David Wilson paid the full net

lien amount to DSHS under protest, specifically reserving the right to institute appropriate legal action to recover the payment at a future date. (CP 152-153.)

The current Washington public assistance application form states, in pertinent part: "By asking for and receiving medical care benefits, I (we) assign to the State of Washington my (our) rights to any medical care support and any third party payments for medical care to pay for covered medical services while receiving medical care benefits." (CP 336.)[1] This assignment of rights to medical care support and payments allows DSHS to step into the Medicaid recipient's shoes for purposes of seeking reimbursement for Medicaid expenditures from liable third parties, including tortfeasors and their insurers.

In July, 1997, Elaine Wilson, as guardian ad litem for David Wilson, brought this action in the Superior Court of the County of King, State of Washington, on behalf of David and others similarly situated against DSHS and related defendants to recover the amounts that David and the other potential class members paid to DSHS in satisfaction of its liens against their non-medical expense personal injury

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[1]Elaine Wilson, who applied for public assistance benefits in 1992 before the current application form was in use, was at no time asked to execute a contractual assignment to the State of Washington in exchange for Medicaid benefits for herself and her family. (CP 388-389.)

causes of action and recoveries. (CP 3-33.)[2]

On December 2, 1998, King County Superior Court Judge J. Kathleen Learned issued a Memorandum Order Granting Plaintiff's Summary Judgment Motion. (App. D.) Judge Learned found that, in Washington, contractual and statutory assignments (RCW 74.09.185) given by Medicaid recipients to the State assign the recipients' rights to recover from a third party payments for medical care benefits only. (App. D-2.) She also found that, because Washington's Medicaid Lien Laws, RCW 74.09.180 and RCW 43.20B.060, go further than the contractual and statutory assignments, and "...expand the department's recovery of its payments from the total monies paid by the third party, regardless of what the payment may be for," these State statutes violate federal anti-lien law (42 U.S.C. § 1396p) which states that no liens may be placed on the property of a Medicaid recipient to secure medical payment reimbursement. (App. D-4.) Judge Learned further expressly recognized that, once the Medicaid recipient assigns their cause of action for medical expenses against any liable third party to the State, under the federal Medicaid scheme, the State, not the recipient, is solely

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[2]The parties agreed that the liability issues in the case could be resolved on cross-motions for summary judgment, and that the issue of class certification should be deferred until after the liability issues were resolved.

responsible for pursuing recovery of medical payment amounts from the third party.

Congress clearly mandates that the states take an active role in both getting an assignment and then pursuing the third party. However, the federal statute does not mention liens and on its face does not appear to contemplate merely riding the coat tails of the recipient and then placing a lien on the entire recovery regardless of how that recovery might be apportioned between the various elements of damage. (Appendix D-5.)

The Washington Supreme Court took direct review and, on October 19, 2000, issued its decision reversing Judge Learned's Order Granting Plaintiffs' Motion for Summary Judgment. (App. A.) The Court, in a narrowly divided 5/4 decision, held that the Washington Medicaid lien laws do not conflict with the federal anti-lien statute "...because the federal statutory scheme allows for the state to be reimbursed from the third party recovery for all medical expenses paid by the state." (App. A-2.)

The majority framed the issue to be decided as: "Whether federal law prohibits the imposition of a state statutory recovery lien against the proceeds of a Medicaid recipient's third party recovery beyond that portion of the recovery allocated specifically to medical expense." (App. A-2.) In analyzing this issue, the Washington Supreme Court majority reasoned, in part, that a valid assignment of David

Wilson's recovery for medical expenses against potentially liable third parties occurred as a matter of law under RCW 74.09.180, one of Washington's Medicaid lien statutes, and RCW 74.09.185, the assignment statute which outlines rights "to payment by any other party for those health care items or services" that the state acquires.[3]

The majority further reasoned that the federal anti-lien statute does not pre-empt Washington's Medicaid lien statutes because there is no conflict causing major damage to a clear federal interest. (App. A-8.) The Court recognized the potential for a conflict between these state and federal laws, but said that, because Elaine Wilson assigned her son's right to payment for medical expenses to the extent paid out by the State to the State, DSHS stepped in and liened David's malpractice recovery before it became his property, so the lien did not operate against his property in a manner that has been prohibited by the federal anti-lien law. (App. A-9.) The majority further opined that, although, as assignee of the Medicaid recipient's cause of action for medical expenses,

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[3]The Court recognized CFR § 433.146(c) and its provision that a state agency can only substitute a statutory assignment for a contractual one if the agency "...informs the individual of the terms and consequences of state law," but apparently concluded, without basis in the record, that DSHS had informed David Wilson's mother of the terms and consequences of the automatic assignment provisions of state law.

the State could have pursued a cause of action against the third party, it was not required to do so; "pursuing potentially liable third parties is merely one of the state's rights." (App. A-11.)[4]

Four Justices of the Washington Supreme Court issued a rousing dissent to the majority's opinion, and the dissenting opinion was authored by now Chief Justice Gerry L. Alexander. Justice Alexander stated: "In my view, RCW 43.20B.060(2) and RCW 74.09.180 both directly conflict with 42 USC § 1396p (1994)." (App. A-17.) Justice Alexander's dissent adopted the reasoning of trial Judge Learned in recognizing the federal requirement that states obtain an assignment from Medicaid recipients of their rights to payment from third parties for medical expenses, and the corresponding federal requirement that the states, as assignees of the medical expense claims of Medicaid recipients, "actively investigate third party recoveries and then pursue action against the third party if the benefits appear to exceed the cost." (App. A-22.) The dissent opined that the State may, without violating the federal anti-lien

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[4]The majority also stated that Washington's statutory scheme does allow the state to compromise Medicaid liens in the interest of fairness, but the record reflects that, since February 1996, DSHS has completely refused to compromise any state lien against a tort recovery unless the cost of recovery would exceed the recoverable amount. (CP 132-133.)

statute, attach its Medicaid lien to the portion of a third party recovery that represents recovery of sums that the State has paid for medical expenses, and pursued collection of as assignee of the medical expense claim, because that portion of the recovery is not the Medicaid recipient's property; it is the State's property. The State cannot, however, attach its lien to any other recovery of the Medicaid recipient, such as their recovery for pain, suffering, loss of income and the like, because to do so would directly conflict with the federal statutory scheme. (App. A-19, 20.)

Justice Alexander also emphasized the fundamental unfairness of the majority decision to the Medicaid recipients that the federal laws were designed to protect.

In the final analysis, the majority decision appears to be more influenced by its concern for replenishment of the State's medical fund, than by a concern for doing equity to Medicaid recipients...While its concerns about the solvency of the fund are certainly legitimate, the fund should be replenished only from amounts that a Medicaid recipient receives for elements of damages for which the State has assumed responsibility. In sum, because the result the majority reaches here is unfair and reliant on a state lien statute that goes beyond what is permitted by federal law, I dissent. (App. A-23.)

## REASONS FOR GRANTING THE WRIT

### I. The Washington Supreme Court decided an important question of federal law that has not been, but should be, settled by this Court.

David Wilson is one small, disabled boy in Seattle whose financial security and future life opportunities have been forever limited by the Washington Supreme Court's decision in the case at bar. The Court's decision will impact David's ability to provide himself with necessities of life and "extras" such as educational and vocational enhancements, and, accordingly, will maximize the chances that he will remain dependent on government "public assistance" for the rest of his life. David is only one of many tort victims in Washington whose life circumstances will be profoundly and negatively affected if the principles enunciated by the Washington Supreme Court in the *Wilson* case do not receive further judicial scrutiny. The *Wilson* decision will also be cited as precedent in Medicaid lien cases in other jurisdictions, so its impact on injured Medicaid recipients will extend far beyond the borders of Washington State.

The *Wilson* decision not only impacts large numbers of injured Medicaid recipients, it flies in the face of the paramount federal policy behind the enactment of federal

Medicaid legislation and regulations. While federal Medicaid laws recognize the legitimate interest of state and federal government in recouping Medicaid expenditures from liable third parties, the overriding concern expressed in federal Medicaid legislation is protection of the impoverished Medicaid recipient throughout the entire course of the recipient's lifetime.

Federal Medicaid statutes reflect the strong federal policy in favor of assisting Medicaid recipients to get back on their feet and, once they do, to stay there. This policy is nowhere greater reflected than in the Medicaid anti-lien and anti-recovery statutes, 42 USC §1396p entitled Liens, adjustments and recoveries, and Transfers of Assets. The preamble to section 1396 states that its purpose is to "enabl[e] each State, as far as practicable...to furnish (1)medical assistance on behalf of...disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such...individuals attain or retain capability for independence or self care..." Section 1396 specifically prohibits all liens "...against property of an individual on account of medical assistance rendered to him under a State plan..." (42 USC 1396(a)) and "...adjustment or recovery of any medical assistance paid on behalf of an

individual under the State plan." These federal anti-lien and anti-recovery statutes are incorporated by reference into 42 USC 1396a entitled State Plans for Medical Assistance at 1396a (18), and are expressly implemented by the CFR's that address Third Party Liability, CRF 433.135 et seq.

There is no question that, due to operation of the federal anti-lien and anti-recovery statutes, in every conceivable non-tort circumstance in which a Medicaid recipient acquires financial means to disqualify the recipient from further receipt of public assistance and Medicaid benefits, the recipient is not required to repay the Medicaid program for medical benefits which the program earlier paid on the recipient's behalf until after the former recipient's death. This means that a Medicaid recipient could become a millionaire by winning the state lottery or inheriting a fortune, and the Medicaid program would be prohibited from seeking repayment for Medicaid benefits previously expended on that recipient's behalf until the time of his or her death.

Federal law, in furtherance of the federal priority to protect Medicaid recipients, also requires each State participating in the Medicaid program to adopt a plan under which the State, as assignee of the recipient's medical expense claim against a liable third party, *must* seek

reimbursement of Medicaid expenditures from potentially liable third parties whenever the amount of reimbursement will exceed the costs of recovery. The Medicaid recipient, on the other hand, is not required by state or federal law to pursue recovery of Medicaid expenditures from any liable third party, but only to cooperate in the State's efforts if the State pursues recovery.[5]

42 USC 1396a, entitled State Plans for Medical Assistance, sets forth federal requirements that State Medicaid plans must meet. 42 USC 1396a(25) states:

> (A) ...*the State...will take all reasonable measures to ascertain the legal liability of third parties*...to pay for care and services available under the plan, including–
> (i) the collection of sufficient information...to enable the *State to pursue claims against such third parties...*
> (ii) *the submission to the Secretary of a plan...for pursuing claims against such third parties...*
> (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the Individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, *the State or local agency will seek reimbursement for such assistance* to the extent of such legal liability;

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[5]"Beneficiaries are not required to pursue the collections themselves. Pursuit is the responsibility of the provider or the State as provided elsewhere in this section." 131 Cong. Record H13093-2.

(Emphasis supplied).[6]

42 USC 1396k, entitled Assignment, Enforcement, and Collection of Rights of Payments for Medical Care; establishment of procedures pursuant to State plan; amounts retained by State, also makes clear that the State, not the Medicaid recipient, is responsible for actively pursuing third party liability collections. See 42 U.S.C. § 1396k(a)(1)(C) and 1396k(a)(2). 42 USC § 1396k further specifies the *only* method which the federal Medicaid statutory scheme allows for states to utilize in collecting Medicaid expenditures from liable third parties: *the method of assignment*. 42 USC 1396k(a)(1)(A) requires that State plans for medical assistance require applicants for medical assistance:

(A) to assign the State any rights, of the individual or any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

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[6]The federal requirement that states must actively pursue third party recoveries of Medicaid expenditures from liable third parties is also incorporated in detail into the federal regulations governing Third Party Liability, 42 CFR 433.135 et seq. The most notable example is 42 CFR 433.139(f)(1) which provides: "(1) *An agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover will be greater than the cost of recovery.* (Emphasis supplied.) Recovery efforts may be suspended or terminated only if they are not cost effective.

Just as there is no question that the federal anti-lien and recovery statutes protect the assets of Medicaid recipients from state liens and recoveries during the recipients' lifetimes, there is no question that, under federal law, where a State, as assignee of the medical expense claim of a Medicaid recipient, pursues collection of medical expense amounts from potentially liable third parties other than potentially liable tortfeasors, the Medicaid recipient is not considered to have a coextensive right or obligation to do so. Once the Medicaid recipient assigns the medical expense claim to the State, the State alone is required to pursue Medicaid recovery.

For example, where a non-custodial parent is, by court order, responsible to make medical payments for a child who is a Medicaid beneficiary, the State, not the child or the child's custodial parent, pursues recovery of Medicaid expenditures made on the child's behalf from the liable non-custodial parent. This is also true where the liable third party is the healthcare insurer of the non-custodial parent, or another type of potentially liable insurer, such as a Personal Injury Protection auto insurer.

Federal Medicaid statutes, including the anti-lien and anti-recovery statutes and Third Party Liability and Assignment statutes do not distinguish between the States'

obligation to pursue Medicaid reimbursement from potentially liable third parties in the tort recovery context as opposed to any other context in which third party liability can arise. Indeed, the federal Medicaid scheme never utilizes the terms "tort" or "tortfeasor" at all.[7] The Washington Supreme Court's holding in the *Wilson* case means that the federal anti-lien and anti-recovery statutes protect all former Medicaid recipients from State liens and recoveries during the recipient's lifetime *except Medicaid recipients injured by tortfeasors*. The notion that there is a basis in federal Medicaid law to distinguish between the States' duties and obligations to collect Medicaid reimbursement from liable third parties in the tort context versus other third party liability contexts is a notion that originated with HCFA, the federal agency charged with third party liability collection and therefore motivated to require states to collect the greatest amount of money with the least amount of effort and risk. A HCFA Directive to State Medicaid Directors dated

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[7]In direct contrast, Washington's Medicaid lien laws speak only to the "tort" injury situation. RCW 43.20B.060 states, in pertinent part, that the "Department shall have a lien upon any recovery by or on behalf of the recipient from the *tortfeasor* or the insurers or both to the extent of the value of the assistance paid...." Similarly, RCW 74.09.180 states that the "Secretary may furnish assistance for injuries or illness, and the department shall thereby be subrogated to the recipients rights against the *tortfeasor* or insurer or both, and shall have a lien."

June 5, 1996 states, in pertinent part: "Section 1917(a) [42 USC Sec. 1396p(a)] precludes states from placing liens on individuals property. However, because a potential personal injury settlement is not yet the plaintiffs' property, it can be subject to a TPL [third party liability] lien." (CP 345). Further, in August of 1994, HCFA disseminated to the States a draft State Medicaid Manual on the subject of TPL which states, in part, as follows:

> Tort situation- in the tort recovery situation, the recovery will often contain more than just an element for medical services, such as pain and suffering or loss of consortium. Thus, the total recovery amount will often exceed the medical expenses. Although the recipient has claim to this recovery amount, he or she has assigned to the State any rights to medical support and to payment of medical care from the third party payer. Thus, you have claim to the entire amount recovered. You may, if permitted under State law, impose a lien upon the tortfeasors...property or upon funds set aside to be used in a settlement of the litigation (*liens and recovery restrictions pertaining to a recipients's property or estate is governed by Sec. 1917 of the Act* [42 USC § 1396p].

While HCFA's agency rules of construction do not apply to a judicial analysis of the mandatory assignment and no-lien provisions of federal law because there is no ambiguity in these provisions, *Chevron USA, Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (rules of construction do not

apply where there is no ambiguity), HCFA has successfully forced even states who do not agree with their rules of construction to apply them in the Medicaid tort recovery situation; a prime example is the State of Washington.

In 1994, HCFA performed a spot audit of DSHS's Third Party Liability program for a 14 month period and determined that the DSHS procedures for distributing money received from casualty settlements and awards were inconsistent with federal legislative provisions for Medicaid because DSHS had exercised its authority, under RCW 43.20B.050,[8] to compromise Medicaid liens against tort recoveries, thereby reducing the total repayment amount, and, accordingly, the federal government's share of that amount. The HCFA "...auditor found that the State did not recover the full lien amount and that the recipient always recovered monies from the settlement." CP186. As a consequence, HCFA disallowed over $75,000 in monies that it maintained DSHS should have remitted to the federal government for the federal government's share of amounts DSHS should have collected from injured Medicaid recipients but did not. CP 191-194.

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[8]RCW 43.20B.050 says, in pertinent part: "...Discretion to compromise...liens rests solely with the secretary or secretary's designee."

The brief filed by the Washington State Attorney General's office in its unsuccessful appeal to the DHHS Appeals Board contained an analysis of federal Medicaid law and the nature of the public assistance applicants' assignment that actually supports plaintiff Wilson's analysis in the case at bar. The State's brief (CP 339-341) stated, in pertinent part:

> Federal law only requires that a state obtain an "assignment of rights of payment for medical support and other medical care owed to recipients. 42 USC § 1396a(a)(45)(emphasis in State's brief)...There is no federal requirement that a Medicaid applicant assign to the state their right to recover their financial loss for lost earning, pain and suffering, and other general damages caused by the negligence of another...As a result of a Medicaid assignment, the state only owns the Medicaid applicant's cause of action against the tortfeasor for medical costs incurred...Furthermore, there is no federal authority...to support the proposition that medical damages assigned to the state take priority over other tort damages owned by the Medicaid applicant...
> (CP 340-341).

The Washington State Attorney General's office rejected its own well reasoned legal analysis and adopted its current position only after HCFA and DHHS, the federal agencies charged with enforcing Medicaid collections, made it clear that the State of Washington would suffer financial penalty if DHHS continued to honor the lien compromise provisions of RCW 43.20B.050.

HCFA's aggressive collection stance and its flawed legal analysis have since been adopted by other states whose state human services agencies, like DSHS, are subject to HCFA auditing authority. In *Wilson*, the legal arguments that originated with HCFA were also accepted by a slim majority of the Washington Supreme Court whose opinion, like the tort collection provisions in HCFA's State Medicaid Manual, glosses over the clear meaning of federal Medicaid provisions, and concludes that the federal Medicaid laws and regulations do not really mean exactly what they say.

The Washington Supreme Court majority reasoned, in part, that the "[t]he state is not required to pursue a cause of action against the third party." (App. A-15). This conclusion is inexplicable because it directly conflicts with the mandatory language of numerous federal Medicaid statutes and regulations which are quoted, in pertinent part, on pages 17 to 19 of this Petition. The Supreme Court majority simply ignored the clear language of these federal Medicaid laws in order to reach the conclusion that it was seemingly predetermined to reach.

The *Wilson* majority also held that "...the state statute allowing the imposition of a lien on the entire settlement is consistent with the federal [anti-lien] statute and thus not preempted" because "...[t]he state's lien was against the

settlement before it became the property of the recipient." (App. A-15). This holding ignores the fact Congress specified the method that states must utilize in satisfying their obligation to actively pursue collection of Medicaid expenditures from liable third parties, including tortfeasors, and that method is the *method of assignment*, not imposition of Medicaid liens which are strictly prohibited by federal law (42 USC 1396p). The assignment given to the State by Medicaid recipients pursuant to 42 USC 1396k reserves nothing and grants to the State "any rights to payment for medical care from any third party..." The State must take action to bring its assigned "rights to payment" to fruition, up to and including initiating litigation against a liable third party such as a healthcare insurer or a tortfeasor. The *Wilson* majority does not explain how, after the Medicaid recipient assigns all "rights to payment for medical care" to the State at the time the recipient is injured and begins incurring medical expenses, the Medicaid recipient still owns those rights to payment and can, on the State's behalf, still claim them in his or her tort cause of action.

Likewise the majority does not explain how the Medicaid recipient still has an ownership interest in his or her tort cause of action for non-medical expense elements of damage, and can file suit and even go to trial against the

tortfeasor to bring the claims to fruition, but the recipient has no ownership interest in settlement proceeds or a jury verdict award that result from pursuit of these claims so that the State's Medicaid lien attaches to the proceeds and, if the Medicaid lien amount exceeds the amount of the settlement or verdict, the injured Medicaid recipient will end up with absolutely nothing.[9]

Certainly, as was recognized by the *Wilson* majority (App. A-14), state and federal governments have legitimate interests in replenishing Medicaid funds and that, as between the Medicaid program and any liable third party, the Medicaid system is the "payor of last resort." However, the federal scheme requires states that elect to participate in the Medicaid Program to pursue recovery of Medicaid payments from liable third parties in *every* instance where the cost of recovery does not exceed the amount of the potential recovery. 42 CFR 433.139(f)(1).[10] If the State fully complies

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[9]The majority says that Washington's lien statute allows recovery "to the extent of the value of assistance paid" (RCW 43.20B.060(2)) and that this law advances the purposes of federal law (App. A-8), but the federal law allows the State to recover from liable third parties on its assigned "right...to payment for medical care" only! (42 USC 1396k(a)(1)(A).)

[10]Where the State has not established probable liability of a third party when a claim is presented for payment, it *must* pay the claim and *must* seek reimbursement from liable third parties whom it later learns exist. 42 CFR 433.139(b),(c).

with this mandate, Medicaid funds should constantly and fairly be replenished. Medicaid may be the "payor of last resort," but, under the federal scheme, the Medicaid recipient is the "payor of no resort."

The federal law questions involved in this case are of vital importance to scores of Medicaid recipients who have been injured by wrongdoing tortfeasors. The overriding goal of federal Medicaid law is to assist and protect current and former Medicaid recipients throughout their lifetimes. Washington's Medicaid lien laws directly conflict with the clear and unambiguous provisions of federal Medicaid laws and regulations, and is well settled that federal law preempts conflicting State law regarding Medicaid statutes. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 101 S. Ct. 2633, 60 L. Ed. 2d 460 (1981).[11] *Wilson* is the first State Supreme Court decision that addresses both federal preemption of State Medicaid lien laws *and* the effect of the federal Medicaid assignment provisions.[12] The result reached by the

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[11]In addition, RCW 74.09.500 provides that DSHS will comply with federal Medicaid requirements. (App. I.)

[12]The only other appellate level case that has addressed the issue of federal preemption of state Medicaid lien laws is the companion case of *McNeil v. State* and *Wallace v. Estate of Jackson*, 972 P.2d 446 (Utah 1998), cert. denied, §28 U.S. 810, 120 S. Ct. 42, 145 L. Ed. 2d 38 (1999), which was a 3/2 decision by the Utah Supreme Court holding that the lien attaches to the property of the third party and thus does not violate the

Washington Supreme Court is contrary to both the letter and the spirit of the federal Medicaid scheme. For all of these reasons, the federal preemption issues raised in the case at bar are worthy of consideration by this Court.

## II. The Washington Supreme Court has decided important federal questions in a way that conflicts in principle with a decision of another State appellate court.

On its face, the assignment given to the State by Medicaid recipients pursuant to 42 USC 1396k is complete and grants to the State all of the Medicaid recipient's "rights to payment for medical care from any third party..." 42 USC 1396k(a)(1)(A). Once the assignment occurs, the State is the sole owner of the "rights to payment for medical care from

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federal no-lien statute. The dissent in *Wallace* derided the majority's holding as an "end run" around the statutory lien prohibition. Unlike *Wilson*, the *Wallace* case did not involve any analysis of the nature of the assignment given by the Medicaid recipient to the State, and the *Wallace* holding was based primarily upon *Cricchio v. Pennisi*, 683 NE2d 301, 660 NYS2d 679 (NY 1997), an often cited New York case that did not consider the issue of federal preemption based upon the assignment and no-lien provisions, but instead focused on interpretation of a New York Social Services law and the narrow timing issue of whether a Medicaid lien placed "on the proceeds of a personal injury settlement must be satisfied before those funds may be transferred to a 'supplemental needs trust.'" Now Chief Justice Alexander of the Washington Supreme Court rejected *Cricchio* and its progeny in his dissenting opinion in *Wilson*, saying that the New York line of cases "...are based entirely on policy arguments and contain no discussion of legislative intent or other authority to support their interpretation of the federal statutes." (App. A-23, Fn.1.)

any third party" and, accordingly, the Medicaid recipient no longer owns these rights. In a recent Minnesota Court of Appeals decision, *Brown v. State*, 617 NW 2d (Minn. App. 2000), the Court recognized this principle, holding that Medicaid recipients were not entitled to any of the proceeds of the State's recovery in tobacco litigation because they had assigned all of their rights to medical expense payments to the State, and had no right to sue third parties for those payments. The *Brown* decision, while not implicating the anti-lien statute preemption issue at issue in *Wilson*, is an affirmation of the key argument made by plaintiff Wilson to the effect that, after he assigned his rights to medical payments to the State, he no longer owned the medical expense claim against the tortfeasors that injured him. Therefore, his medical malpractice recovery, accomplished without participation by or assistance from the State of Washington as assignee of the medical expense claim, was compensation for his non-medical expense elements of damage only. That compensation was his sole property, and, when the State of Washington took over $100,000 of it through imposition of a State Medicaid lien, the State's action was an illegal violation of the federal anti-lien statute 42 USC 1396p.

The Minnesota Supreme Court, on February 28, 2001,

heard argument in *Martin v. State of Minnesota*, 615 N.W. 2d 867 (2000), Rev. granted Oct. 17, 2000, a case which raises the same federal preemption and assignment issues that are at the heart of the *Wilson* Washington Supreme Court decision and in which the plaintiff relies, in part, on the *Brown* assignment analysis. If this Court decides not to accept review of the *Wilson* decision based on other arguments made in this Petition, plaintiff Wilson respectfully requests that the Court defer decision on this Petition for Certiorari until the Minnesota Supreme Court renders its decision in *Martin v. State.* The Minnesota Supreme Court's decision, if contrary to the *Wilson* holding, will create a direct conflict in the decisions of the courts of last resort in Washington and Minnesota.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed March 9, 2001

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

| | |
|---|---|
| DAVID WILSON, individually and through his Guardian ad Litem ELAINE WILSON DUNMORE, and as representative of a class, | ) No. 68297-6 |
| Respondent, | ) PUBLISHED OPINION |
| v. | |
| THE STATE OF WASHINGTON; THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES DIVISION OF PROVIDER SERVICES, and the DIVISION OF PROVIDER SERVICES THIRD PARTY RESOURCE PROGRAM (the "State Defendants"), | ) FILED OCTOBER 19, 2000 |
| Petitioners, | |
| and LYLE QUASIM, Secretary of the Department of Social and Health Services, in his official capacity, and TOM BEDELL, Acting Director of the State of Washington Division of Provider Services, in his official capacity and JANE DOE and JOHN DOE Defendants (the 'Individual Defendants'), | |
| Defendants. | |

GUY, C.J. – This case is an appeal from a partial summary judgment and is before this court on transfer from Division One of the Court of Appeals. The original case was a class action brought by David Wilson, through his guardian ad litem, as class representative for a proposed class of persons who had third party liability injury claims and received medical assistance from the Department of Social and Health Services (DSHS) for injury related medical expenses. This class of people has been compelled by state law to pay a portion of their settlements or judgments to the state as reimbursement for medical assistance.

We are asked to decide whether the state law, which attempts to lien a Medicaid recipients third party recovery beyond that portion specifically allocated to medical expenses, conflicts with the federal law and is thus preempted. We hold the state statute does not conflict with the federal law because the federal statutory scheme allows for the state to be reimbursed from the third party recovery for all medical expenses paid by the state.

FACTS

Respondent David Wilson was born prematurely and suffered complications as a result. At the time he was born, his mother was a welfare recipient and therefore eligible to receive Medicaid. Wilson developed staphylococcal aureus meningitis,

allegedly caused by the care he received at the hospital. Several brain surgeries were performed on Wilson but, due to the illness, he is permanently and severely disabled. Clerk's Papers at 54-55. The total amount the state provided for Wilson's medical expenses was $184,555. Clerk's Papers at 55, 145.

Two years later, in 1994, Wilson's attorney guardian ad litem brought a medical negligence suit against the hospital and physicians who had treated Wilson during his initial hospitalization. Before settlement, DSHS filed a statutory lien and asserted a claim in the amount of $184,555 against any recovery made on behalf of Wilson. Wilson recovered a settlement totaling $750,000. DSHS deducted its pro rata share of attorney fees and costs and asserted a right of reimbursement for $108,303. Clerk's Papers at 57. Wilson reimbursed DSHS the $108,303 under protest and filed the lawsuit that is the subject now before this court.

Wilson's complaint against DSHS alleged that federal Medicaid law prohibits the imposition of any lien whatsoever against his third party recovery. Wilson argued federal law prohibits states from seeking reimbursement from settlements or judgments obtained by Medicaid recipients on their own effort; states must pursue third parties directly. Wilson also alleged that in pursuing its rights of subrogation, assignment,

and lien for reimbursement of Medicaid assistance, DSHS committed the torts of fraud and negligent misrepresentation and also violated Wilson's due process rights by not providing Wilson a hearing prior to asserting the reimbursement claim. Clerk's Papers at 7-15.

After stipulating there were no issues of material fact and only issues of law, both parties moved for summary judgment. The order granting partial summary judgment stated that RCW 74.09.185 acts as an assignment as a matter of law by declaring that the state is considered to have acquired rights to payment by any other party for health care items or services. The court stated that this assignment is not of the total right to recover, but only the right to recover from the portion of the settlement specifically allocated to medical expenses. The court reasoned that the federal statute allows for assignment; therefore, the Washington assignment law is consistent with the federal law. The order stated that Washington law is inconsistent where the law attempts to put a lien on property that is not recovery for medical payments. The court concluded that the Washington law, which attempts to lien property that is not a recovery of medical payments, is in conflict with federal law and is thus preempted. Clerk's Papers at 405-06.

DSHS submitted a motion for discretionary review of the trial court decision to Division One of the Court of Appeals.

After the Court of Appeals granted review, Wilson argued the case be transferred to this court. We granted a review and now decide the issue presented in this case.

ISSUE

Whether federal law prohibits the imposition of a state statutory recover lien against the proceeds of a Medicaid recipient's third party recovery beyond that portion of the recovery allocated specifically to medical expenses.

DISCUSSION

Medicaid is a publicly funded medical assistance program for poor and disabled persons. The state and federal government jointly fund this program. Medicaid is available in two different circumstances. The first is to aid individuals who do not have the resources to obtain insurance or otherwise pay their medical bills. The other is as a resource for the elderly and disabled who need institutional care but have insufficient funds to finance it. Medicaid is to be the payment source of last resort; all other available resources must be used before Medicaid funds are made available to eligible recipients. S. Rep. No. 146, 99th Cong., 1st Sess. 459 (1985), reprinted in 1986 U.S.C.C.A.N. 42. In order for the system to function it must be replenished so as to provide a source of support for subsequent Medicaid recipients.

The initial determination is whether the state acquired

the right to reimbursement for the funds it paid out. A valid assignment of recovery for medical expenses paid occurred as a matter of law. Under the federal scheme the agency must require individuals to assign to the state third party payments for medical care. 42 C.F.R. sec. 433.146 (1998) (addressing assignment of rights to benefits under medical assistance programs). Moreover, assignment of this right is required for the recipient to be eligible to receive assistance. 42 U.S.C. sec. 1396k (1994). States are required to enact laws under which "the State is considered to have acquired the rights of such individual {medical assistance recipient} to payment by any other party for such health care items or services." 42 U.S.C. sec. 1396a(a)(25)(H) (Supp. 1998). RCW 74.09.180, .185, and RCW 43.20B.060 fulfill this requirement. The first statute provides: "{T}he department shall thereby be subrogated to the recipient's rights against the recovery had from any tort feasor or the tort feasor's insurer, or both, and shall have a lien thereupon to the extent of the value of the assistance furnished by the department." RCW 74.09.180. RCW 74.09.185 outlines the rights "to payment by any other party for those health care items or services" the state is considered to have acquired. RCW 43.20B.060(2) states that to secure this reimbursement "{t}he department shall have a lien upon any recovery by or on behalf of the recipient from such tort feasor

or the tort feasor's insurer, or both to the extent of the value of the assistance paid."

A statutory assignment is allowed in this setting. The federal regulation states "{i}f assignment of rights to benefits is automatic because of State law, the agency may substitute such an assignment for an individual executed assignment, as long as the agency informs the individual of the terms and consequences of the State law." 42 C.F.R. sec. 433.146(c) (1998). Thus the federal law permits a statutory assignment in this setting.[1] Because RCW 74.09.180, .185, and RCW 43.20B.060 act as a statutory assignment, Wilson's rights to payment from third parties to the state were assigned when benefits were applied for and received. The issue remains whether the lien is against the entire amount of the settlement or if it is only against that portion of the settlement allocated to medical expenses. The trial court concluded that the state law is preempted to the extent it attempts to lien property that is not a recovery of Medicaid because it allows the state to lien what the trial court viewed as the Medicaid recipient's property. This court has stated that "{f}ederal law preempts state law when Congress intends to occupy a given field, when state law directly conflicts with federal law, or when state law would hinder accomplishment of the full purposes and objectives of the federal law." *Berger v. Personal Prods. Inc.*, 115 Wn. 267,

270, 797 P.2d 1148 (1990), cert. denied, 499 U.S.961, 111 S. Ct. 1584, 113 L. Ed. 2d 649 (1991) (citing *Alverado v. WPPSS*, 111 Wn.2d 424, 431, 759 P.2d 427 (1988), cert. denied, 490 U.S. 1004, 109 S. Ct. 1637, 104 L. Ed. 2d 153 (1989)). There is a presumption against preemption unless the state law frustrates the clear and manifest purpose of the federal law. *Goodwin v. Bacon*, 127 Wn.2d 50, 896 P.2d 673 (1995).

The federal law does not preempt the state law here because there is no conflict that causes major damage to a clear federal interest. 42 U.S.C. sec. 1396a(a)(250(H) (Supp. 1998) expressly instructs the state to have in effect laws under which "the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." Coupled with this express delegation of authority, the federal statute directs states to recover the amount paid out in assistance "to the extent that payment has been made . . . for health care items or services." 42 U.S.C. sec. 1396a(a)(25)(H) (Supp. 1998). By the state having in place statutes under which it has the right to recover "to the extent of the value of the assistance paid," the state law advances the purposes and objectives of the federal law. RCW 43.20B.060(2).

Wilson argues that the state law is preempted because the federal law does not permit the department to place liens on

recipients' property in certain contexts.[2] In the current situation, the Medicaid recipient assigned the right to payment to the extent paid out by the state. See RCW 74.09.180, .185, and RCW 43.20B.060. As such, the department steps in and puts a lien on the recovery before it becomes the property of the Medicaid recipient. Because the department does not have a lien on "property" of the recipient, the state statute permitting this lien is not in conflict with the federal statute.

The federal statute permits states to enact legislation providing for reimbursement to the department of funds paid out by the state. Reimbursement is not limited to the portion of the settlement specifically allocated to recovery for medical expenses. The federal statute states:

> that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services. 42 U.S.C. sec. 13996a(a)(25)(H) (Supp. 1998) (emphasis added).

Therefore, the state is not limited to recovery from only that portion of the settlement specifically allocated to medical expenses. The federal statute states recovery is to the extent of payment made by the state for health care items or services.

The trial judge found ambiguity between RCW 74.09.180 and .185. However, when these sections are read as a whole and in light of the federal statute, there is no ambiguity. Section .180 states "the department shall thereby be subrogated to the recipient's rights against the recovery had from any tort feasor or the tort feasor's insurer, or both, and shall have a lien thereupon to the extent of the value of the assistance furnished by the department." (Emphasis added.) Section .185 states:

> To the extent that payment for covered expenses has been made under medical assistance for health care items or services furnished to an individual, in any case where a third party has a legal liability to make payments, the state is considered to have acquired the rights of the individual to payment by any other party for those health care items or services. (Emphasis added.)

The trial judge implied section .185 may be subject to two interpretations: "for those health care items or services" may be interpreted as a description of the type of payment from a third party, or as a description of the amount the department may recover. When these two sections are read as a whole and in light of the federal statute allowing for recovery to the extent of assistance provided, the department is to recover the amount of assistance provided. The reimbursement is not limited to the recovery allocated specifically to medical expenses. Wilson asserted that the state should actively pursue claims against liable third parties. However, the assignment is for the right of

payment from the third party, not solely the right to pursue a cause of action against the third party.[3] Although the federal scheme allows a state to pursue third parties, the option to pursue such parties is merely one of the state's rights. See 42 U.S.C. sec. 1396k(C) (1994) (individual is required to assist the state in pursuing liable third parties); 42 U.S.C. sec. 1396a(a)(25) (Supp. 1998) ("the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties"). The federal scheme also identifies that the state has rights to payment by other parties for health care items or services. 42 U.S.C. sec. 1396a(a)(25)(H) (Supp. 1998). Under federal law the state has the right to either pursue third parties directly or collect from third party recovery. Consistent with federal law, the state statute takes into consideration those circumstances in which the state does not pursue a claim, but merely steps in after recovery is made. See RCW 74.09.180, and RCW 43.20B.060. Moreover, if the department recovers through an action brought by the recipient, the recovery is reduced by the pro rata share of attorney fees and costs. RCW 43.20B.060(4). Both the federal and state laws take into account those situations in which the state does not pursue its own claim.

The conclusion that a lien may be imposed on the entire settlement is consistent with decisions from courts faced with

similar issues. The Utah Supreme Court decided that the state is not prohibited from asserting a lien on a Medicaid recipient's recovery from a third party. *Wallace v. Estate of Jackson*, 972 P.2d 446 (Utah 1998), cert. denied, 120 S. Ct. 42, 145 L. Ed. 2d 38 (1999). The court reasoned that payments made by a third party do not legally become the property of the recipient until after settlement "because third party settlement proceeds have been specified by the recipient as belonging to the State Medicaid Agency as a precondition of the recipient's eligibility." Id. at 448 (quoting State's brief). The issue of whether the entire settlement is subject to the state's lien was addressed on remand in a New York case. See *Link v. Town of Smithtown*, 175 Misc. 2d 238, 670 N.Y.S.2d 692 (1997). The plaintiff in *Link* argued that the state's reimbursement claim was limited to the portion of the settlement earmarked as medical expenses while the portion allocated to pain and suffering could not be included in the reimbursement. Id. at 694. The court considered both the state and federal statute and concluded that all the settlement proceeds were available to satisfy the amount of reimbursement. Id. Another New York court stated the following in finding that the state may recover from the settlement the entire amount paid out:

> Appellants argue that only the settlement proceeds specifically allocated to past medical expenses should be available to satisfy the Medicaid lien. Nowhere in the elaborate statutory

scheme governing this area of the law, however, is the agency's right of recovery restricted in this manner. A State that has furnished Medicaid acquires the rights of recipients 'to payment by any other party for such health care items or services,' and must 'retain { }' from the recovery an amount 'as is necessary to reimburse it for medical assistance payments made on behalf of an individual.' *Calvanese v. Calvanese*, 93 N.Y.2d 111, 113, 710 N.E.2d 1079, 688 N.Y.S.2d 479 (1999), cert. denied, 120 S. Ct. 323 (1999) (quoting 42 U.S.C. sec. 1396a(a)(25)(H) (Supp. 1998); sec. 1396(b)(1994)).

In an Eighth Circuit Court of Appeals case involving a Medicaid recipient attempting to place the third party recovery into a special need trust without satisfying the existing state reimbursement lien, the court ruled that the state had a right to enforce its lien. *Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328 (8th Cir. 1998). The court stated that recipients should not be able to avoid reimbursing the state because that would "eviscerate Congress's clearly expressed intention that these funds be repaid" and negate the "Social Security Act's comprehensive scheme permitting states to place these liens." Id. at 333 (quoting *Norwest Bank of North Dakota, N.A. v. Doth*, 969 F. Supp. 532, 534 (1997). An additional concern is the situation that may arise in which the lien for reimbursement exceeds the settlement amount. The Washington statutory scheme does allow for compromise providing for fairness in the recovery to injured Medicaid recipients. Discretion is given to the secretary or the secretary's designee to compromise liens.

RCW 43.20B.050. This is similar to an issue discussed by the New York court in *Link*. The court stated that it is up to the "lien holder who is charged with monitoring and dispensing Medicaid resources to agree to compromise the lien if, in its estimation, justice, fairness and equity dictate such a decision." *Link v. Town of Smithtown*, 670 N.Y.S.2d at 696. The court went on to state that "{i}f public welfare officials across the state are not consistent and reasonable in exercising their discretion in hardship cases, based on the assumption that liens should be satisfied in full in all cases, then legislative intervention would be warranted to assure equity and fairness." Id. Allowing for some flexibility in compromising the lien provides some measure of fairness when the reimbursement exceeds the settlement amount.

CONCLUSION

Congress has stated that Medicaid is to be the payment source of last resort and all other available resources must be used before Medicaid funds are made available to eligible recipients. S. Rep. No. 146, 99th Cong., 1st Sess. 459 (1985), reprinted in 1986 U.S.C.C.A.N. 42. This program provides funds when no other funds are available. In order to continue to provide this assistance, the source must be replenished. To ensure the existence of a payment source, the federal scheme requires assignment of rights to seek reimbursement from any

third party to the extent of medical assistance paid as a condition of eligibility for Medicaid. Federal law allows the assignment to be statutory. The assignment in this case was a valid statutory assignment, and because of this assignment, the state was given the right to recover the amount paid out in assistance to the Medicaid recipient. The state's lien was against the settlement before it became the property of the recipient. Since the lien was not placed on the property of the recipient, the state statute allowing this is consistent with the federal statute and thus not preempted. Federal law does not require the state to pursue the third party; that is merely one of the options available to the state. Additionally, federal law allows for recovery to the extent payment has been made. Therefore, the entire amount of the settlement is available to reimburse the state. We hold the state statute allowing the imposition of a lien on the entire settlement is consistent with the federal statute and thus not preempted. We therefore reverse the trial court's decision and strike the order entered by the court.

WE CONCUR:

[1]The current public assistance benefits form states: "By asking for and receiving medical care benefits, I (we) assign to the State of Washington my (our) rights to medical care support and any third party payments for medical care to pay for recovered medical services while receiving medical care benefits." Clerk's Papers at 336. This acts as an

express assignment made by the recipient specifically assigning the right to third party payments for medical care support paid by the state. At the time Wilson's mother applied for assistance, the "pre-1992" version of the application form did not contain this assignment language assigning the specific rights to third party payment. The form stated: "By asking for and receiving financial or medical care benefits, I assign to the State of Washington all rights to any support, including child support or medical care support." Clerk's Papers at 337. Wilson's rights to third party payments for medical care were statutorily assigned, however, when Wilson's mother applied for and received public assistance; therefore, it was not necessary for her to sign a form constituting an express assignment of those rights in order for those rights to be assigned. Moreover, Wilson's mother was on notice that, by applying for and receiving state assistance, rights to medical care support were assigned.

[2]The state argues that 42 U.S.C. sec. 1396p (1994), which prohibits liens on the property of a recipient to secure reimbursement, applies only in the estate recovery context. But due to the lien being placed on the settlement prior to it becoming the property of the Medicaid recipient, the prohibition outlined in section 1396p is irrelevant. The text of section 1396p addresses situations in which the individual is 55 years of age or older who received assistance consisting of "nursing facility services, home and community-based services, and related hospital and prescription drug services." 42 U.S.C. sec. 1396p(b)(1)(B)(i) (1994). This section also addresses transfers of assets and treatment of trust amounts. 42 U.S.C. sec. 1396p(c), (d) (1994). Additionally, the legislative history of this section indicates it applies only in the estate recovery context. The house report accompanying the 1993 amendments made to this statutory scheme refer to the language in section 1396p as relating to "Medicaid estate recoveries." H.R. Rep. No. 103-11, sec. 5116, 5112, 103d cong., 1st Sess. (1993),

reprinted in 1993 U.S.C.C.A.N. 378, 535-36. On its face and considering the legislative history, section 1396p appears to address only the recovery in the estate context; however, 42 U.S.C. sec. 1396a(18) (1994) states that a state plan must "comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." This creates some ambiguity as to whether section 1396p applies exclusively to the estate recovery context because it references liens in general and medical assistance correctly paid. However, this issue need not be addressed since the state statute is not in conflict with this federal lien provision. The recovery being liened is not the property of th recipient and therefore does not conflict with the lien prohibition in the federal statute.

[3]The same issue was addressed in a New York Court of Appeals decision. Because the federal law requires cooperation from the state in recovering funds paid out, the state must require assigning of the right to see reimbursement from the third party. The court stated: "As an alternative to suing the responsible third party directly, the Department may pursue reimbursement indirectly by placing a lien on personal injury suits brought by a Medicaid recipient against the responsible party." *Calvanese v. Calvanese*, 93 N.Y.2d 111, 117, 710 N.E.2d 1079, 688 N.Y.S.2d 479 (1999), cert. denied, 120 S. Ct. 323 (1999).

Majority by Guy, C.J.

ALEXANDER, J. (dissenting) – In my view, RCW 43.20B.060(2) and RCW 74.09.180 both directly conflict with 42 U.S.C. sec. 1396p (1994). I reach that conclusion because these statutes purport to allow the State to impose its lien on a Medicaid recipient's entire recovery from a third party.

Because of this direct conflict with a federal statute, the state statutes are preempted. *Berger v. Personal Prods., Inc.*, 115 Wn.2d 267, 270, 797 P.2d 1148 (1990). I would, therefore, affirm King County Superior Court Judge J. Kathleen Learned's well-reasoned decision granting partial summary judgment to the plaintiff. Because the majority does otherwise, I dissent. Notwithstanding my disagreement with the result the majority reaches, I find myself in agreement with some of its conclusions. For instance, I entirely agree with its discussion of the subrogation rights of the State for medical costs it has paid pursuant to federal Medicaid law. See RCW 74.09.180(1). I also agree with it that the assignment a Medicaid recipient is required to make to the State of any 'third party payments for medical care' deprives the recipient of any proprietary interest in the portion of the recovery that represents reimbursement for medical expenses that have been paid by the State. For reasons I set forth hereafter, I part company with the majority's conclusion that the State's lien affixes to the Medicaid recipient's recovery beyond that which represents reimbursement for medical expenses.[1]

42 U.S.C. sec. 1396p(a)(1) (1994) provides, in pertinent part, that "{n}o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State

plan{.}" On the surface, this federal statute would appear to prevent a state from imposing a lien on any portion of a Medicaid recipient's third party recovery. The statute must, however, be considered in light of 42 U.S.C. sec. 1396a(a)(25)(H) (Supp. 1998), which requires states to promulgate statutes under which "the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services{.}" (Emphasis added.) Account must also be taken of 42 U.S.C. sec. 1396k (1994), which requires states to obtain an assignment of rights to recovery of payment for medical expenses from a third party as a condition of eligibility for medical assistance. When this statutory scheme is considered in its entirety, it is apparent that a state is vested with authority to require Medicaid recipients to assign to the State their right to obtain payments from another party for health care items or services.[2] That coupled with the legislative declaration in RCW 74.09.185 that "the state is considered to have acquired the rights to payment by any other party for health care",[3] leads to a conclusion that the Medicaid recipient does not acquire a proprietary interest in that portion of his or her recovery representing payment for health care items or services. It is clear, therefore, that the State is free to attach its lien to the portion of the recipient's recovery that represents recovery of sums that the State has paid for medical

expenses. RCW 74.09.180 and RCW 43.20b.060(2), however, go beyond what the State is authorized to do in that they purport to allow the Department to place a lien upon 'any recovery' by the recipient. This as the trial court properly observed conflicts with the federal statutory scheme.

The majority concludes that federal law does not preempt state law 'because there is no conflict.' Majority at 8. It reaches this conclusion after examining the same federal and state statutes that are set forth above. The majority seizes on the language in RCW 43.20B.060(2), which gives the Department a lien "to the extent of the value of the assistance paid" and concludes that it "advances the purposes and objectives of the federal law." Majority at 8 (quoting RCW 43.20B.060(2)). In my view, RCW 43.20B.060(2) does precisely the opposite and literally flies in the face of the federal statutory scheme. In the final analysis, the majority relies on the state statute almost entirely and ignores the plain language in 42 U.S.C. sec. 1396(a)(25)(H) that limits a state from acquiring any part of the recipient's recovery from a third party beyond the payment "for such health care and services." In sum, the majority fails to harmonize the state and federal statutes and does not overcome what is readily apparent–the state statutes are in direct conflict with the federal statute.

I observe, also, that the result the majority reaches is

contrary to the interpretation we have placed on an analogous statute. In *Flanigan v. Department of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), we looked at RCW 51.24.060, which requires an injured worker or beneficiary to reimburse the Department of Labor and Industries when the worker or beneficiary obtains a recovery from a party at fault. In *Flanigan*, we concluded that the Department could not satisfy its lien out of damages the injured worker recovered as compensation for loss of consortium, indicating that the Department could not "share in damages for which it has provided no compensation" because such a result would be "absurd and fundamentally unjust." 123 Wn.2d at 426.

The result the majority reaches here is every bit as unjust to Medicaid recipients. Under the decision, a Medicaid recipient can be unfairly deprived of amounts he or she receives as damages for pain, suffering, loss of income and the like–elements of damage that are unrelated to medical expenses that have been paid by the State. An example makes the point: Assuming that a Medicaid recipient receives $10,000 in Medicaid benefits for medical expenses incurred in an accident. Assume further that the recipient later receives a damage award or settlement from a party at fault in the amount of $10,000, one half of which is to compensate the recipient for lost wages and pain and suffering. Under the majority opinion, the

Medicaid recipient would receive not a cent of the $10,000. The State, instead, would obtain the entire recovery and would, thus, share in the portion of damages for which it has not provided compensation.

The majority suggests that any unfairness inherent in this scheme can be mitigated by the State's ability to compromise its lien if, in its estimation, "justice, fairness and equity dictate such a decision." Majority at 14 (quoting *Link v. town of Smithtown*,, 175 Misc.2d 238, 670 N.Y.S.2d 692, 696 (1997)). While the State may do that in certain cases, a Medicaid recipient has no assurance that the State would adopt a compromising position in evaluating his or her circumstances. Recipients of Medicaid should not have to rely on the mere possibility that the secretary of the Department of Social and Health Services will afford him or her a measure of equity.

I also recognize that the State has expressed concern that, in most cases where a claim against a third party is settled short of trial, it is difficult to determine what portion of the settlement represents medical payments. I agree with the trial judge that Congress has adequately addressed this concern "by requiring states to actively investigate third party recoveries and then pursue action against the third party if the benefits appear{} to exceed the cost." Order Granting Summ. J., Clerk's Papers at 407. While I can readily understand that the

result the majority reaches will make it easier for the State to recoup amounts it has paid for the benefit of Medicaid recipients, the State is not without effective ways to protect the public purse that are not inconsistent with federal law. In the final analysis, the majority decision appears to be more influenced by its concern for replenishment of the State's medical fund, than by a concern for doing equity to Medicaid recipients. Majority at 5, 12. While its concerns about the solvency of the fund are certainly legitimate, the fund should e replenished only from amounts that a Medicaid recipient receives as reimbursement for elements of damages for which the State has assumed responsibility.

In sum, because the result the majority reaches here is unfair and reliant on a state lien statute that goes beyond what is permitted by federal law, I dissent.

[1]I am not persuaded by the majority's authority to the contrary. The court in *Norwest Bank of N.D., N.A. v. Doth,* 159 F.3d 328 (8th Cir. 1998), for example, expressly refused to address the "question of whether the lien may be satisfied out of the entire amount of the personal injury award or settlement, or only that portion of the settlement attributable to past medical expenses." 159 F.3d at 334. Additionally, the line of New York decisions cited in the majority opinion do not persuade me. Those cases are based entirely on policy arguments and contain no discussion of legislative intent or other authority to support their interpretation of the federal statutes.

[2]The trial court noted, that since 1992, Medicaid recipients must

"assign their rights to 'third party payments for medical care.'" Clerk's Papers (CP) at 405. See also majority at 7 n.1 (quoting the "current public assistance benefits form").

[3]As the trial court observed "{t}his provision essentially acts as an assignment by operating of law of the recipient's rights to recover from a third party payments owed for medical care as a result of third party{'s} negligence or wrong doing." Order of Summ. J., CP at 405.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

| | |
|---|---|
| DAVID WILSON, individually and through his Guardian ad Litem ELAINE WILSON DUNMORE, and as representative of a class, | ) No. 68297-6 |
| Respondent, | ) ORDER DENYING |
| v. | ) MOTION FOR RECONSIDERATION |
| THE STATE OF WASHINGTON; THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES DIVISION OF PROVIDER SERVICES, and the DIVISION OF PROVIDER SERVICES THIRD PARTY RESOURCE PROGRAM (the "State Defendants"), | |
| Petitioners, | |
| and LYLE QUASIM, Secretary of the Department of Social and Health Services, in his official capacity, and TOM BEDELL, Acting Director of the State of Washington Division of Provider Services, in his official capacity and JANE DOE and JOHN DOE Defendants (the 'Individual Defendants'), | |
| Defendants. | |

The Court having considered the Respondent's Motion and Memorandum Supporting Withdrawal of Opinion and Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondent's motion is denied.

DATED at Olympia, Washington, this 12th day of December 2000.

/s/
CHIEF JUSTICE

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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|---|---|
| DAVID WILSON, individually and through his Guardian ad Litem ELAINE WILSON DUNMORE, and as representative of a class, | ) MANDATE<br>) No. 68297-6 |
| Respondent, | ) King County No. 97-2-18838-5 SEA |
| v. | |
| THE STATE OF WASHINGTON; THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES DIVISION OF PROVIDER SERVICES, and the DIVISION OF PROVIDER SERVICES THIRD PARTY RESOURCE PROGRAM (the "State Defendants"), | |
| Petitioners, | |
| and LYLE QUASIM, Secretary of the Department of Social and Health Services, in his official capacity, and TOM BEDELL, Acting Director of the State of Washington Division of Provider Services, in his official capacity and JANE DOE and JOHN DOE Defendants (the 'Individual Defendants'), | |
| Defendants. | |

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on October 19, 2000, became the decision terminating review of this Court in the above entitled cause on December 12, 2000. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $421.98 awarded to Appellants State of Washington, Department of Social and Health Services, Division of Provider Services and Division of Provider Services Third Party Resource Program to be paid by Respondent David Wilson. Order Denying Motion for Reconsideration was entered herein on December 12, 2000.

I have affixed the seal of the Supreme Court of the State of Washington and Filed this Mandate this 13th day of December 2000.

/s/

C. J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Andrew Scott
Kathryn Williams
Roblin Williamson

Bruce Turcott
Reporter of Decisions

D-1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

| | |
|---|---|
| DAVID WILSON, individually and through his Guardian ad Litem ELAINE WILSON DUNMORE, and as representative of a class, | ) No. 97-2-18838-5SEA |
| Plaintiffs, | ) ORDER GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION |
| v. | |
| STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al., | |
| Defendants. | |

This matter came on for hearing on cross motions for Summary Judgment. The essential issue is whether or not the state is prohibited by operation of a federal anti-lien provision from imposing a lien on a third party recovery of a medicaid recipient beyond that portion of the recovery that reflects repayment for medical benefits for an injury even though the settlement obtained by the recipient is a compromise settlement and does not represent full recovery for medical services. The plaintiff argues that the state is only entitled to that portion of the recovery that is related to repayment for medical expenses and that the remainder of the recovery cannot be "liened

against" because of a provision in federal Medicaid law that prohibits placing a lien upon the property of recipient for recovery of medical benefits paid.

This court makes undisputed findings and conclusions of law as follows:

State law provides alternative remedies for recovery of benefits paid on behalf of a recipient of medicaid arising out of an incident for which a third party is ultimately liable. Washington law provides for assignment, subrogation and liens.

A. Assignment

1. Since 1992 medicaid recipients assign their rights to "third party payments for medical care" on their application form for benefits as a condition to receiving benefits in a potential third party situation. It is notable that this assignment is not an assignment of the full right to recover from a third party for injuries, but only the right to recover medical care benefits."

2. Even without the contract assignment above, RCW 74.09.185 declares that the state "is considered to have acquired the rights...to payment by a third party for health care..." This provision essentially acts as an assignment by operation of law of the recipient's rights to recover from a third party payments owed for medical care as a result of third party

negligence or wrong doing. Again it is notable that this statutory "assignment" is only of the amounts that reflect payments for health care expenses and is not an acquisition of the total cause of action against the tortfeasor.

3. Federal law requires that recipients must assign to the state their rights to payments for medical care from third parties. Again the assignment is not of the total right to recover, but only of the right to recover payments for medical care.

B. Liens

1. Washington law goes further than the assignments above and "subrogates" itself to a recipient's right of recovery against the third party. RCW 74.09.180 and RCW 43.20B.050. These provisions clearly do not limit the department from seeking its reimbursement from the third party's payments of medical expenses, but expands the department's recovery of its payments from the total monies paid by the third party, regardless of what the payment may be for. In other words, these sections of the statute authorize recovery to the department of its subrogated amount from payments that represent lost wages, lost earning capacity, future medical expenses, pain and suffering, and the like. The only limitation is that the department may only recover from the third party that is responsible for the injury that necessitated the expenses

paid by the department. There is some ambiguity regarding legislative intent due to this difference in scope between RCW 74.09.180 and 185.

2. Federal law, 42 USC at section 1396p, clearly states that no liens may be placed on the property of a recipient to secure reimbursement for medical payments. There are a few exceptions that do not apply here.

C. Analysis

1. Federal law is internally consistent. Section 1396a(25) requires recipients to "assign" their rights to medical payments from third parties. Once assigned such rights are no longer property of the recipient and there is no conflict with the prohibition against "liens" in section 1396p. Clearly Congress intended that the states could recover from a recipient's rights to medical payments but otherwise retained intact the prohibition from recovering from any other property of the recipient.

2. Washington law's assignment of limited recovery rights are consistent with Federal Lw [sic]. Its attempt so lien property that is not a recovery of medical payments is in conflict with federal law.

3. The State's argument that the lien against non-assigned property is not against the property of the recipient is unpersuasive in light of the language of the Washington

statutes. The liens authorized are against the "recovery" and the "rights to payment" of the recipient. The property of the third party is not lienable, such as in the case of materialmen's liens. Notice is to the recipient, not to the third party. The lien does not attach to any money in the hands of the third party, but attaches when it becomes a payment and recovery, judgment or settlement, etc.

4. The federal statute demonstrates a Congressional intent not to invade any other assets of the recipient to repay medical benefits except to the extent that the recipient is entitled to be payed [sic] by a third party for those medical costs. All the relevant sections of the federal statute have the limiting language of recovery of medical payments made by the third party. Congress clearly mandates that the states take an active role in both getting an assignment and then pursuing the third party. However, the federal statute does not mention liens and on its face does not appear to contemplate merely riding the coat tails of the recipient and then placing a lien on the entire recovery regardless of how that recovery might be apportioned between the various elements of damage.

5. It must be presumed that Congress was fully aware that third party recoveries are rarely limited to medical payments and almost always include other elements of damage such as past and future wage and earning capacity losses,

payments for future medical costs (when the recipient might not be eligible for medicaid coverage) and pain and suffering. It must be further presumed that congress was well aware that many settlements represent a compromise and are not necessarily a full recovery dollar for dollar. Nevertheless, insight of these elementary facts of litigant life, Congress did not require states to pursue reimbursement from the other economic and non-economic elements of a recipients third party lawsuit. Instead Congress has expressly prohibited a lien against property of the recipient and did not create an exception for a third party recovery.

6. The issue presented is whether or not he [sic] federal anti-lien law must prevail under the pre-emption doctrine over Washington statutes authorizing such a lien beyond what has been assigned to the department. Pre-emption is found if there is a clear conflict and if the conflict causes major damage to a clear federal interest. Congress has clearly stated that a recipients' property may not be liened. That federal interest would be severely undermined if the states could make an exception for third party recoveries. Congress has squarely considered the third party tortfeasor situation and designed a method of recoupment. That method is limited to pursuing only those monies that are owed by the third party for medical payments.

7. The state raises the concern about how is one to determine in a settlement situation what portion of the settlement represents medical repayments, and further that the recipient and the third party shouldn't be allowed to arbitrarily determine that themselves. Congress appears to have addressed that concern by requiring states to actively investigate third party recoveries and then pursue action against the third party if the benefits appears to exceed the cost. In other words, interpleading or initiating the litigation themselves would protect the state. The recipient could not settle and release the third party for medical payments since the state by contract or law has been assigned those rights. The state's problem arises primarily because the state does not get actively involved in the litigation recovery process, but only seeks to recoup the benefits.

Based on the above the court grant's plaintiff's motion to the extent consistent with the above.

Dated: December 2, 1998.

/s/
JUDGE J. KATHLEEN LEARNED

# WEST'S REVISED CODE OF WASHINGTON ANNOTATED
# TITLE 43. STATE GOVERNMENT–EXECUTIVE
# CHAPTER 43.20B. REVENUE RECOVERY FOR DEPARTMENT OF SOCIAL AND HEALTH SERVICES GENERAL PROVISIONS

43.20B.060. Reimbursement for medical care or residential care–Lien–Subrogation–Delegation of lien and subrogation rights

(1) To secure reimbursement of any assistance paid under chapter 74.09 RCW or reimbursement for any residential care provided by the department at a hospital for the mentally ill or habilitative care center for the developmentally disabled, as a result of injuries to or illness of a recipient caused by the negligence or wrong of another, the department shall be subrogated to the recipient's rights against a tort feasor or the tort feasor's insurer, or both.

(2) The department shall have a lien upon any recovery by or on behalf of the recipient from such tort feasor or the tort feasor's insurer, or both to the extent of the value of the assistance paid or residential care provided by the department, provided that such lien shall not be effective against recoveries subject to wrongful death when there are surviving dependents of the deceased. The lien shall become effective upon filing with the county auditor in the county where the assistance was

authorized or where any action is brought against the tort feasor or insurer. The lien may also be filed in any other county or served upon the recipient in the same manner as a civil summons if, in the department's discretion, such alternate filing or service is necessary to secure the department's interest. The additional lien shall be effective upon filing or service.

(3) The lien of the department shall be upon any claim, right of action, settlement proceeds, money, or benefits arising from an insurance program to which the recipient might be entitled (a) against the tort feasor or insurer of the tort feasor, or both, and (b) under any contract of insurance purchased by the recipient or by any other person providing coverage for the illness or injuries for which the assistance or residential care is paid or provided by the department.

(4) If recovery is made by the department under this section and the subrogation is fully or partially satisfied through an action brought by or on behalf of the recipient, the amount paid to the department shall bear its proportionate share of attorneys' fees and costs.

(a) The determination of the proportionate share to be borne by the department shall be based upon:

(i) The fees and costs approved by the court in which the action was initiated; or

(ii) The written agreement between the attorney and client

which establishes fees and costs when fees and costs are not addressed by the court.

(b) When fees and costs have been approved by a court, after notice to the department, the department shall have the right to be heard on the matter of attorneys' fees and costs or its proportionate share.

(c) When fees and costs have not been addressed by the court, the department shall receive at the time of settlement a copy of the written agreement between the attorney and client which establishes fees and costs and may request and examine documentation of fees and costs associated with the case. The department may bring an action in superior court to void a settlement if it believes the attorneys' calculation of its proportionate share of fees and costs is inconsistent with the written agreement between the attorney and client which establishes fees and costs or if the fees and costs associated with the case are exorbitant in relation to cases of a similar nature.

(5) The rights and remedies provided to the department in this section to secure reimbursement for assistance, including the department's lien and subrogation rights, may be delegated to a managed health care system by contract entered pursuant to RCW 74.09.522. A managed health care system may enforce all rights and remedies delegated to it by the department to

secure and recover assistance provided under a managed health care system consistent with its agreement with the department.

**RCW 74.09.180 Chapter does not apply if another party is liable – Exception – Subrogation – Lien – Reimbursement – Delegation of lien and subrogation rights.**

(1) The provisions of this chapter shall not apply to recipients whose personal injuries are occasioned by negligence or wrong of another; PROVIDED, HOWEVER, That the secretary may furnish assistance, under the provisions of this chapter, for the results of injuries to or illness of a recipient, and the department shall thereby be subrogated to the recipient's rights against the recovery had from any tort feasor or the tort feasor's insurer, or both, and shall have a lien there upon to the extent of the value of the assistance furnished by the department. To secure reimbursement for assistance provided under this section, the department may pursue its remedies under RCW 43.20B.060.

(2) The rights and remedies provided to the department in this section to secure reimbursement for assistance, including the department's lien and subrogation rights, may be delegated to a managed health care system by contract entered into pursuant to RCW 74.09.522. A managed health care system may enforce all rights and remedies delegated to it by the department to secure and recover assistance provided under a managed health care system consistent with its agreement with the department.

**RCW 74.09.185 Third party has legal liability to make payments – State acquires right – Lien – Equitable subrogation does not apply.**

To the extent that payment for covered expenses has been made under medical assistance for health care items or services furnished to an individual, in any case where a third party has a legal liability to make payments, the state is considered to have acquired the rights of the individual to payment by any other party for those health care items or services. Recovery pursuant to the subrogation rights, assignment, or enforcement of the lien granted to the department by this section shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, except as provided in RCW 43.20B.050 and 43.20B.060. The doctrine of equitable subrogation shall not apply to defeat, reduce, or prorate recovery by the department as to its assignment, lien, or subrogation rights.

# WEST'S REVISED CODE OF WASHINGTON ANNOTATED
## TITLE 43. STATE GOVERNMENT – EXECUTIVE
## CHAPTER 43.20B. REVENUE RECOVERY FOR DEPARTMENT OF SOCIAL AND HEALTH SERVICES -GENERAL PROVISIONS

43.20B.050. Liens–Compromise–Settlement or Judgment

(1) No settlement made by and between the recipient and tort feasor and/or insurer shall discharge or otherwise compromise the lien created in RCW 43.20B.060 without the express written consent of the secretary. Discretion to compromise such liens rests solely with the secretary or the secretary's designee.

(2) No settlement or judgment shall be entered purporting to compromise the lien created by RCW 43.20B.060 without the express written consent of the secretary or the secretary's designee.

# WEST'S REVISED CODE OF WASHINGTON ANNOTATED
## TITLE 74. PUBLIC ASSISTANCE
## CHAPTER 74.09. MEDICAL CARE

### 74.09.500. Medical assistance–Established

There is hereby established a new program of federal-aid assistance to be known as medical assistance to be administered by the state department of social and health services. The department of social and health services is authorized to comply with the federal requirements for the medical assistance program provided in the Social Security Act and particularly Title XIX of Public Law (89-97) in order to secure federal matching funds for such program.

42 U.S.C.A. § 1396k

§1396k. Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall–

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required–

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the

individual is described in section 1396a(1)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of

common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 USC § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

(18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, and transfers of assets;...

42 USC § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

...

(25) provide–

(A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan, including–

(i) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and

(ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall–

(I) be integrated with, and be monitored as a part of the Secretary's review of the States's mechanized claims processing and information retrieval system under section 1896b(r) of this title, and

(II) be subject to the provision of section 1896(b)(r)(4) of this title relating to reductions in Federal payments for failure to meet conditions of approval, but shall

not be subject to any other financial penalty as a result of any other monitoring, quality control, or auditing requirements;

(B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;

(C) that in the case of an individual who is entitled to medical assistance under the State plan with respect to a service for which a third party is liable for payment, the person furnishing the service may not seek to collect from the individual (or any financially responsible relative or representative of that individual) payment of an amount for that service (i) if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1396o of this title), or (ii) in an amount which exceeds the lesser of (I) the amount which may be collected under section 1396o of this title, or (II) the amount by which the amount payable for that service under the plan (disregarding section 1396o of this title), exceeds the total of the amount of the liabilities of third parties for that service;

(D) that a person who furnishes services and is participating under the plan may not refuse to furnish services to an individual (who is entitled to have payment made under the plan for the services the person furnishes) because of a third party's potential liability for payment for the service.

(E) that in the case of prenatal or preventive pediatric care (including early and periodic screening and diagnosis services under section 1396d(a)(4)(B) of this title) covered under the State plan, the State shall–

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to the liability of a third party for payment for such services; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(F) that in the case of any services covered under such plan which are provided to an individual on whose behalf child support enforcement is being carried out by the State agency under part D of subchapter IV of this chapter, the State shall–

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to any third-party liability is derived (through insurance or otherwise) from the parent whose obligation to pay support is being enforced by such agency, if

payment has not been made by such third party within 30 days after such services are furnished; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(G) that the State prohibits any health insurer (including a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1167(1)], a service benefit plan, and a health maintenance organization), in enrolling an individual or in making any payments for benefits to the individual or on the individual's behalf, from taking into account that the individual is eligible for or is provided medical assistance under a plan under this title for such State, or any other State; and

(H) that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services;

42 USC § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

...

(45) provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients, in accordance with section 1396k of this title;

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets.

(a) Imposition of lien against the property of an individual on account of medical assistance rendered to him under a State plan;

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except–

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on

such individual's home if–

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [42 USCS §§ 1381 et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 USCS § 1382c], or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of

an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of–

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C) (i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for

nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources–

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time–

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [42 USCS §§ 1381 et seq.]) States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 USCS § 1382c]; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when–

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one

year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual–

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and

shall include in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 C.F.R. § 433.36 Liens and Recoveries

(a) Basis and purpose. This section implements sections 1902(a)(18) and 1917(a) and (b) of the Act, which describe the conditions under which an agency may impose a lien against a recipient's property, and when an agency may make an adjustment or recover funds in satisfaction of the claim against the individual's estate or real property.

(b) Definition of property. For purposes of this section, "property" includes the homestead and all other personal and real property in which the recipient has a legal interest.

(c) State plan requirement. If a State chooses to impose a lien against an individual's real property (or as provided in (g)(1) of this section, personal property), the State plan must provide that the provisions of paragraph (d) through (i) of this section are met.

(d) Procedures. The State plan must specify the process by which the State will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home as provided in paragraph (g)(2)(ii) of this section. The description of the process must include the type of notice to be given the individual, the process by which the individual will be given the opportunity for a hearing, the hearing procedures, and by whom and on what basis the determination that the individual

cannot reasonably be expected to be discharged from the institution will be made. The notice to the individual must explain what is meant by the term lien, and that imposing a lien does not mean that the individual will lose ownership of the home.

(e) Definition. The State plan must define the following terms used in this section:

(1) Individual's home.

(2) Equity interest in home.

(3) Residing in the home for at least 1 (or 2) year(s).

(4) On a continuing basis.

(5) Discharge from the medical institution and return home.

(6) Lawfully residing.

(f) Exception. The State plan must specify the criteria by which a son or daughter can establish to the agency's satisfaction that he or she has been providing care which permitted the individual to reside at home rather than in an institution, as provided in paragraph (h)(2)(iii)(B) of this section.

(g) Lien provisions–

(1) Incorrect Payments. The agency may place a lien against an individual's property, both personal and real, before his or her death because of Medicaid claims paid or to

be paid on behalf of that individual following a court judgment which determined that benefits were incorrectly paid for that individual.

(2) Correct Payments. Except as provided in paragraph (g) (3) of this section, the agency may place a lien against the real property of an individual at any age before his or her death because of Medicaid claims paid or to be paid for that individual when–

(i) An individual is an inpatient of a medical institution and must, as a condition of receiving services in the institution under the State plan, apply his or her income to the cost of care as provided in §§ 435.725, 435.832 and 436.832; and

(ii) The agency determines that he or she cannot reasonably be expected to be discharged and return home. The agency must notify the individual of its intention to make that determination and provide an opportunity for a hearing in accordance with State established procedures before the determination is made. The notice to an individual must include an explanation of liens and the effect on an individual's ownership of property.

(3) Restrictions on placing liens. The agency may not place a lien on an individual's home under paragraph (g) (2) of this section if any of the following individuals is lawfully

residing in the home;

(i) The spouse;

(ii) The individual's child who is under age 21 or blind or disabled as defined in the State plan; or

(iii) The individual's sibling (who has an equity interest in the home, and who was residing in the individual's home for at least one year immediately before the date the individual was admitted to the medical institution.

(4) Termination of lien. Any lien imposed on an individual's real property under paragraph (g) (2) of this section will dissolve when that individual is discharged from the medical institution and returns home.

(h) Adjustments and Recoveries.

(1) The agency may make an adjustment or recover funds for Medicaid claims correctly paid for an individual as follows:

(i) From the estate of any individual who was 65 years of age or older when he or she received Medicaid; and

(ii) From the estate or upon sale of the property subject to a lien when the individual is institutionalized as described in paragraph (g) (2) of this section.

(2) The agency may make an adjustment or recovery

under paragraph (h) (1) of this section only;

(i) After the death of the individual's surviving spouse; and

(ii) When the individual has no surviving child under age 21 or blind or disabled as defined in the State plan; and

(iii) In the case of liens placed on an individual's home under paragraph (g) (2) of this section, where there is no–

(A) Sibling of the individual residing in the home, who has resided there for at least one year immediately before the date of the individual's admission to the institution, and has resided there on a continuous basis since that time; or

(B) Son or daughter of the individual residing in the home, who has resided there for at least two years immediately before the date of the individual's admission to the institution, has resided there on a continuous basis since that time, and can establish to the agency's satisfaction that he or she has been providing care which permitted the individual to reside at home rather than in an institution.

(i) Prohibition of reduction of money payments. No money payment under another program may be reduced as a means of recovering Medicaid claims incorrectly paid.

42 C.F.R. Subpart D - Third Party Liability § 433.135 Basis and purpose.

This subpart implements sections 1902(a)(25), 1902(a)(45), 1903(d)(2), 1903(o), 1903(p), and 1912 of the Act by setting forth State plan requirements concerning–

(a) The legal liability of third parties to pay for services provided under the plan;

(b) Assignment to the State of an individual's rights to third party payments; and

(c) Cooperative agreements between the Medicaid agency and other entities for obtaining third party payments.

42 C.F.R. § 433.136 Definitions.

...

*Third party* means any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan.

...

42 C.F.R. § 433.137 State plan requirements.

(a) A State plan must provide that the requirements of §§ 433.138 and 433.139 are met for identifying third parties liable for payment of services under the plan and for payment of claims involving third parties.

(b) A State plan must provide that–

(1) The requirements of §§ 433.151 through 433.154 are met for cooperative agreements and incentive payments for third party collections.

(2) The requirements of §§ 433.151 through 433.154 are met for cooperative agreements and incentive payments for third party collections.

(c) The requirements of paragraph (b)(1) of this section relating to assignment of rights to benefits and cooperation in obtaining medical support or payments and paragraph (b)(2) of this section are effective for medical assistance furnished on or after October 1, 1984. The requirements of paragraph (b)(1) of this section relating to cooperation in identifying and providing information to assist the State in pursuing liable third parties are effective for medical assistance furnished on or after July 1, 1986.

42 C.F.R. § 433.138. Identifying liable third parties.

(a) Basic provisions. The agency must take reasonable measures to determine the legal liability of the third parties who are liable to pay for services furnished under the plan. At a minimum, such measures must include the requirements specified in paragraphs (b) through (k) of this section, unless waived under paragraph (1) of this section.

42 C.F.R. § 433.137 State plan requirements.

42 C.F.R. § 433.139. Payment of Claims.

(f) *Suspension or termination of recovery of reimbursement.* (1) An agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover will be greater than the cost of recovery. Recovery efforts may be suspended or terminated only if they are not cost effective.

(2) The State plan must specify the threshold amount or other guideline that the agency uses in determining whether to seek recovery of reimbursement from a liable third party, or describe the process by which the agency determines that seeking recovery of reimbursement would not be cost effective.

(3) The State plan must also specify the dollar amount or period of time for which it will accumulate billings with respect to a particular liable third party in making the decision whether to seek recovery of reimbursement.

42 C.F.R. § 433.146. Rights assigned; assignment method.

(a) Except as specified in paragraph (b) of this section, the agency must require the individual to assign to the State–

(1) His own rights to any medical care support available under an order of a court or an administrative agency, and any third party payments for medical care; and

(2) The rights of any other individual eligible under the plan, for whom he can legally make an assignment.

(b) Assignment of rights to benefits may not include assignment of rights to Medicare benefits.

(c) If assignment of rights to benefits is automatic because of State law, the agency may substitute such an assignment for an individual executed assignment, as long as the agency informs the individual of the terms and consequences of the State law.

V-1

STATEMENT OF LIEN

Notice is hereby given that the State of Washington, Department of Social and Health Services, has rendered assistance or provided residential care to David L. Wilson, a person who was injured on or about the 21st day of January, 1992, in the County of King, State of Washington, and the said Department hereby assets a lien, to the extent provided in RCW 43.20B.060, for the amount of such assistance or residential care, upon any sum due and owing David L. Wilson, alleged to have caused the injury, and/or his or her insurer and from any other person or insurer liable for the injury or obligated to compensate the injured person on account of such injuries by contract or otherwise.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

_____

Louise Brantley, Medical Claims Examiner

STATE OF WASHINGTON )
)ss.
COUNTY OF THURSTON )

I, Louise Brantley, being first duly sworn on oath, state: that I am Medical Claims Examiner; that I have read the foregoing Statement of Lien, know the contents thereof, and believe the same to be true.

_____

Louise Brantley, Medical Claim Examiner

SIGNED AND SWORN TO OR AFFIRMED before me this 1st day of December, 1992 by Louise Brantley.

_____

NOTARY PUBLIC IN and for the State of Washington.
My appointment expires August 22, 1993.

RETURN:
Department of Social and Health Services
Medical Assistance Administration
TPL Casualty Unit MS HA-11
P.O. Box 45561 Olympia, Washington 98504-5561
Phone: (206) 664-9393 or 1-800-562-6136
DSHS 9-22 (Rev. 7/90)